In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 73.

IN THE MATTER OF JOHN RUFFALO, JR.,
Petitioner.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR REHEARING.

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Now come the Ohio State Bar Association and the Mahoning County Bar Association and petition for rehearing by this Court of its decision of April 8, 1968, in this cause. The Court, before permitting its decision to become final, should reexamine, and reconsider, the basis of its holding, because:

1. The Court's decision creates a contradiction likely to do irreparable harm to the cause of justice. The wrong this Court says was done to petitioner Ruffalo, this Court's judgment in turn inflicts upon others—viz.: the public, the courts, and the judicial system. The due process this Court says was denied to Ruffalo, this Court has denied to the bar associations engaged in an imperatively important, albeit distasteful, task of striving for honorable standards at the bar. This Court may or may not agree with the standard, but it cannot in conscience deny to bar associations, or the public, the same due process it accords petitioner. It is precisely such denial that has here occurred, as next will be pointed out.

Recall that this Court reversed the Sixth Circuit's judgment of disbarment because petitioner was not in-

formed, in advance of the hearing, of the charge on which he was disciplined. That charge was added on the third day of hearings that were not to close for another eight months. If in that eight months new hearings had been started, petitioner could not have complained. However, instead of starting a fresh proceeding, the charge was added by amendment—and Ruffalo was assured of whatever time he might wish for answer.

Next, observe that claim of denial or loss of any right whatever by *failure to give the advance notice* this Court's judgment demands:

1. *Was not raised* by petitioner when he made his response to the show-cause order entered by the Court of Appeals for the Sixth Circuit.
2. *Was not raised* by petitioner in his brief to the Court of Appeals.
3. *Was not raised* by petitioner in his oral argument to the Court of Appeals.
4. *Was not passed upon* by the Court of Appeals in entering the judgment of disbarment.
5. *Was not raised* by petitioner in his petition for certiorari.
6. *Was not argued* by petitioner in his brief to this Court.
7. *Was not argued by petitioner* at the bar of this Court.

The *only* suggestion that failure to give advance notice of the charge denied petitioner any right whatever, came in the dissenting opinion in the Court of Appeals. But, with the dissenting opinion before him, petitioner *refused* in this Court to support that claim as a ground for reversal.

A clearer case of waiver of the only point on which this Court has reversed is not to be imagined.

But, more important, if, under the circumstances of this record, due process requires that a lawyer be given notice (before the hearing starts) of a charge on which his peers assert he has been faithless to his public obligation (and it is not enough that he be given, as here, full opportunity to meet the charge) then, if reason is to retain its seat, due process equally requires that those who perform the unhappy public duty of seeking to maintain integrity at the bar, be accorded like due process. They, as representatives of the public, are entitled to the same notice and opportunity to defend as is petitioner. The right to due process is as important to the one as to the other. To reverse a judgment concerning professional integrity upon an issue neither raised nor passed upon below, not asserted as a ground for reversal, and not conceived of by petitioner as a denial of right, is as grave a denial of due process as that which this Court says it corrects. Evenhanded due process, that demands notice to one party, commands like notice to the other, so that both may focus on the issue that is to control and bring to the Court's attention considerations to which the Court should be alerted before it decides. If a case is not to be decided on its issues, there is no point in either framing them or giving notice of them.

The Court's denial to one party of the due process it demands for the other is understandable only on the hypothesis, which itself marks a second wrong, that—

2. The Court's decision is bottomed upon mistake of fact. Whatever is to be said of the advance notice point in the proceedings before the Supreme Court of Ohio in *Mahoning County Bar Association v. Ruffalo* (1964), 176 Ohio St. 263, 199 N.E.2d 396, certiorari denied (1964), 379 U.S. 931, petitioner indisputably *did* have *advance notice* of the charge on which he was disbarred in the

proceedings before the Court of Appeals—the only proceedings here in review. And petitioner defended in those proceedings, not on the ground that he did not have advance warning of the charge, but on the ground that it was ethically upright conduct to do what he did.

The Court should, therefore, reopen—and should stay its hand until it has the full story—because, if it is wrong to hear a charge without notice, *it is equally wrong* to reverse on a record not made. This Court should not cast loose a decision based upon mistake of fact.

It is the more important that the Court stay its hand because—

3. The Court's decision promises mischievous consequences in two directions. *First*, this Court has never held that one may acquire virtual immunity by voluntarily revealing his misdeeds. Had petitioner *refused* to testify, he could not, for that refusal, be disciplined. But he *did* testify. He met the charge of soliciting by revealing what—in the judgment of the 17 members of the Ohio Supreme Court's Board of Commissioners on Grievances and Discipline, and in the judgment of five judges of the Ohio Supreme Court, and in the judgment of all three judges of the Court of Appeals (for even the dissenting judge found "the employment of a railroad employee to investigate accident claims against his own employer opens a tempting door to industrial spying which no person of ordinary conscience should be asked to go by every normal work day," 370 F.2d at 462)—was misconduct more serious than the misconduct he was explaining. To excuse one default he revealed another.

Now, note that even in a criminal case, this Court has yet to hold that evidence the accused voluntarily supplies, without standing on his constitutional right to remain

silent, may not be shown against him. If in a civil disciplinary proceeding, such as this, a lawyer may sterilize evidence by blurting it out, it is difficult to find the ground on which a criminal defendant is to be denied the same opportunity to create immunity. Consequences to the criminal law so profound this Court will not wish to invite. And, surely, before any decision with such potential for mischief is made final, the Court will wish to reexamine the question.

Second, the decision leaves uncertain whether discipline at the bar demands a code defining, as would a criminal code, the well-nigh infinite variety of acts of misconduct for which a lawyer may be disciplined. If that is what is required, then a new six-foot shelf is surely in the making. As is known, the American Bar Association is at work on a restatement of the Canons. This Court should reflect on the consequences of the present decision upon efforts to maintain the integrity of the bar. This Court owes to the profession, to the courts, to the public, to the administration of justice, the guidance that only this Court can give.

Reexamination is needed also because—

4. The Court's decision rests on impermissible factual assumptions that surely need to be reexamined, and it sanctions inferences apt to generate problems the Court will find it difficult to live with in the adjudication of disciplinary problems this decision will spawn, not only in law, but in all the professions. Observe that:

(a) *The relationship between Ruffalo and Orlando* is not the chaste arrangement described by the Court. It had been going on for years. Ruffalo had already shown his contempt for the law by failing for "more than five years" (until the commencement of the present proceed-

ings) to pay the costs assessed against him when in 1957 "he was found 'guilty of unprofessional conduct in his office as an attorney at law * * *.'" 176 Ohio St. at 269. The lengths to which Ruffalo and Orlando went to hide the relationship—involving resort to the practice of making payments in cash only, and destruction of records—alone ought to raise question whether findings below ought to be overthrown, and whether, as this Court believed, Ruffalo "chose a railroad man to help him investigate those claims because Orlando knew railroading." (Slip Opinion, p. 4.) The moment Orlando was fired by the railroad (on the ground he was soliciting claims against the company, 176 Ohio St. at 265), Orlando's services to Ruffalo also ceased. Orlando's knowledge of "railroading" was no less *after* he was fired than it was before; his usefulness only was changed: he no longer had access to B. & O. yards and property. Until then he had been astonishingly active in his "investigating." He worked full time for the railroad; he said he worked 10 to 15 days a month for Ruffalo. He was paid $25 a day, plus expenses. Ruffalo reported to the Internal Revenue Service that he paid Orlando $14,018.62, of which $4,716.00 was paid in the six and one-half months he worked for Ruffalo in 1961 (up to the time when he was fired by the railroad and his services to Ruffalo ended). As Judge Edwards, dissenting on other grounds, put it, in answering Ruffalo's claim that Orlando had no supervisory responsibilities and no access to records:

> "I cannot avoid concluding that Orlando's access to the B. & O.'s property and personnel would be of potential value to respondent [Ruffalo] and that it would some times be impossible (probably even for Orlando) to know when Orlando was working for the railroad and when he was investigating for respondent." 370 F.2d at 462.

(b) *This Court acted in the mistaken belief* that in the Court of Appeals "The majority held that while one of the two charges might not justify discipline, the other one did * * *." (Slip Opinion, p. 1.) The Court is in error. The Court of Appeals disbarred on Charge 13; it said, "We do not reach" Charge 8. 370 F.2d at 450. The Court of Appeals reserved Charges 3, 8, 9, 10, 11 and 12. They are charges of soliciting, maintaining clients, and threatening and intimidating witnesses. They are set forth in 370 F.2d at 454-460. As to this the Court of Appeals said:

> "Our failure to discuss them should not be construed as indicating that we disagree with or find unreliable the other findings [i.e., upholding Charges 3, 8, 9, 10, 11 and 12] of the Board of Commissioners." 370 F.2d at 449, Note 2.

(c) *Apart from the fact that the "advance notice"* point, on which this Court reversed, was never raised in these proceedings, reversal on this ground generates a second problem. The authority this Court (Slip Opinion, p. 6) relied upon, *Randall v. Brigham* (1868), 7 Wall. 523, 540, as establishing in a disbarment case the need for "notice * * * and opportunity * * * for explanation and defense," does *not* require such notice to be given *in advance* of the hearing. To the contrary, *Randall* makes clear that (p. 540):

> "It is not necessary that proceedings against attorneys for malpractice, or any unprofessional conduct, should be founded upon formal allegations against them. Such proceedings *are often instituted* [as here] *upon information developed in the progress of a cause;* or from what the court learns of the conduct of the attorney from his own observation." [1]

[1] Emphasis supplied throughout.

It cannot be doubted that Ruffalo had precisely such notice, and opportunity to explain and defend.

Observe also that it generally is the law that if (as here) an issue is tried, although not pleaded *in advance*—and is, therefore, an issue of which no advance notice was given—Rule 15(b) of the Federal Rules of Civil Procedure permits amendment *even after judgment,* and says further that "failure so to amend does *not* affect the result of the trial * * *."

(d) *Ruffalo has never claimed* that the testimony he and Orlando gave, on which Ruffalo was disbarred on Charge 13 for hiring Orlando to prepare and investigate lawsuits against his own employer, is untrue. This Court, however, has reversed because Ruffalo, having been charged on that evidence, could thereafter "be given no opportunity to expunge the earlier statements and start afresh." (Slip Opinion, p. 7.)

The Court should consider whether discipline can be maintained at the bar, or in any of the professions, if there is such right, after revealing the facts, to "start afresh."

In addition—

5. The Court's decision leaves unresolved the further proper course of these proceedings. The Court of Appeals ruled on one ground of misconduct. Six others the Court of Appeals reserved. 370 F.2d at 449. May the court, if it gives fresh notice, hear charge 13? May the court hear the other six charges? To be sure, the Court of Appeals can be left to deal with these problems as best it can, and, in case of claim of error, let the case wander back here again. However, efficiency in judicial proceedings, conservation of judicial energy, and justice to the parties all combine to urge that these matters be not left open—unresolved.

CONCLUSION.

This case raises serious and important problems.

The Court should restore the case to the calendar for reargument, reexamination and reconsideration.

Respectfully submitted,

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May 6, 1968.

CERTIFICATE OF COUNSEL.

Thomas V. Koykka says he is counsel for the Ohio State Bar Association and the Mahoning County Bar Association in this cause, and certifies that the foregoing Petition for Rehearing is presented in good faith and not for delay.

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